1997

# Edward L. and Brenda DeWolf v. Michael V. Turley : Brief of Appellant

Utah Court of Appeals


Richard Coxson; Attorney for Appellee.
Denton M. Hatch; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS DOCKET NO. 970174-CA

Edward L. and Brenda **DEWOLF**,
Plaintiffs and Appellees,

**v.**

Michael V. **TURLEY**
Defendant and Appelant.

**BRIEF OF THE APPELLANT**

970174-CA
No. 970039
940401013
Priority No. 15

Appeal for Fourth District Court, Millard County, Judge Donald Eyre, Jr.

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## STATEMENT OF JURISDICTION

Jurisdiction over this appeal is granted by Section 78-2(a)-3 Utah Code. It is an appeal from a final judgment of The Fourth Judicial District Court For Millard County, State of Utah, assigned by the Utah Supreme Court to the Court of Appeals.

## STATEMENT OF ISSUES FOR REVIEW

1. Did the Fourth District Court violate Michael Turley's due process rights under the Utah and United States Constitutions by failing to give adequate notice of need to appoint counsel, trial, or entry of judgment, and by failing to advise him, and by denying him a him an opportunity to present his defenses at a hearing?

*Standard of Review:* The question of whether the Trial Court strictly complied with procedural requirements is a question of law that is reviewed for correctness. See generally State v. Pena, 869 P.2d. 932, 936, 938 (Utah 1994). The Court of Appeals reviews a question of constitutional fact independently. State v. Vincent, 845 P.2d. 254 (Utah. App. 1992).

This issue is preserved in the record at 122-128, 141, 155-159, 175-181.

2. Did the Fourth District Court err when it denied Michael Turley's Motion for Relief under Rule 60(b)(7)?

*Standard of review:* An order denying a motion for relief from a default judgment is reviewed for an abuse of discretion, but the trial court's discretion is narrow. The trial court must consider the importance of resolving a case on its merits and protecting the interest of both parties in presenting their case. Doubt as to the fairness of the default

should result in a decision to set aside. Utah Department of Transportation v. Osguthorpe, 892 P.2d. 4, 8 (Utah 1995). The question of whether the trial court strictly complied with procedural requirements is a question of law that is reviewed for correctness. See generally State v. Pena, 869 P.2d. 932, 936, 938 (Utah 1994). If necessary, the question of whether the Trial Court correctly found that the Plaintiff Appellee would be prejudiced if the judgment is set aside should be reviewed as a finding of fact which is reviewed for clear error. State v. Blair, 868 P.2d. 802, 805, (Utah 1993).

This issue was preserved in the record at 122-128, 141, 152-153, 180.

## DETERMINATIVE CONSTITUTIONAL PROVISIONS STATUTES, ORDINANCES, RULES AND REGULATIONS

1. Rule 60(b) Utah Rules of Civil Procedure.

**Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party, (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have perspective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after

the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

2. Utah Constitution Article 1 Section 7.

No person shall be deprived of life, liberty or property, without due process of law.

## A STATEMENT OF THE CASE

This appeal is from a final Judgment of the Fourth Judicial District Court for Millard County, State of Utah. At the time of trial the Court ordered Turley's answer stricken and Default Judgment was entered. Record at 100. Turley's Motion For Relief To Set Aside Default Judgment was denied and this appeal followed. Record at 175.

DeWolfs' sued Turley regarding their purchase of Turley's home. Both parties obtained counsel. Turley went to China on a temporary employment assignment and while there he discharged his attorney because he did not think his attorney was representing him properly. Record at 141. His attorney filed a Notice of Withdrawal in August of 1995. Record at 54. It was difficult for Turley to receive mail in China. Some of his mail was sent to his brother in Nevada and was returned. Some of his mail went to Windsor, Connecticut, then to Hong Kong, then it was hand carried to China, and hand carried to Turley. Turley received some of his mail and he did not receive some of his mail. Sometimes mail was held at the Chinese border for inspection. Some of the Court's mail was returned. Record at 123-124, 155. Notice to Appoint Counsel was sent on September 5, 1995 but Turley does not recall receiving it. Record at 157. A Notice of non-jury Trial was sent on January 18, 1996 setting trial for February 15, 1996. Record at 66-67. Turley received

the Notice of Trial just two days before trial and immediately called the Court clerk to let the clerk know that he could not attend and requested a continuance. The clerk said she would inform the Court which she did. Record at 124, 156, phone message which is bottom unnumbered document on the left hand side of the file containing the record. At trial on February 15, 1996, only plaintiff appeared and the Court ordered Turley's Answer stricken and Default was entered. Record at 100. On April 18, 1996, the Court entered judgment in the amount of $24,587 including $9,000 for a new well and 10,000 for emotional distress. Record at 100. Turley did not receive any communication from the Court after his phone call to the Court just before Trial until he returned to the United States approximately four and one half months later. Record at 156. Notice of Entry of Judgment was sent May 3, 1996. Record at 110. In late July or early August, Turley received notice that judgment had been entered against him and he immediately contacted his present counsel and filed a Motion For Relief From Judgment pursuant to Rule 60(b) on August 22, 1996. Record at Record at 156. The Court entered an Order denying that motion on December 9, 1996. Record at 175. Addendum document two.

## SUMMARY OF ARGUMENT

I. There was a constitutional violation. Notice violated due process because it was insufficient and untimely, no information regarding rights was given or any other accommodation, and there was no hearing.

II. There was an abuse of discretion. The Rule 60(b) motion was filed timely. The court failed to consider lack of prejudice to the other party. The court also failed to give Mr. Turley any advice, or consider Mr. Turley's good faith under difficult circumstances including being out of the country without reliable mail and being unrepresented.

# ARGUMENT

I. There was a denial of constitutional rights.

A. Standard of Review.

The Court of Appeals review a question of constitutional fact independently. State v. Vincent, 845 P. 2d 254 (Utah. App. 1992)

B. Notice of hearing and entry of judgment, and information regarding rights.

When a layman is representing himself, he should be accorded every consideration that may be reasonably be indulged, and this would include giving him some information relating to his rights, and more than two days to prepare for trial. Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983). An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950).

Notice must be more than a gesture. The effort must be as one who actually desires to give the absentee notice. Notice mailed to the last known address of a person not found within the state after diligent search does not satisfy due process. See Graham v. Sawaya, 632 P.2d 851 (Utah 1981).

In this case, Mr. Turley while in China discharged his

attorney because he did not think his attorney was representing him properly. Record at 141. A notice to appoint counsel was sent to him but not received. Record at 157. He did not understand trial procedure and was surprised to learn that firing his attorney put him in jeopardy, and that the opposing attorney obtained judgment against him. Record at 156.

He received notice of trial two days before his case was set for trial. He telephoned immediately from China where he was working and told the Court that he wanted the chance to defend his case on its merits, and he requested an extension so that he could be in the United States to present his defense. Record at 156. The record contains the telephone message which Michael Turley left with the Judge two days before trial. It is the first document (unnumbered) on the left side of the folder which contains the record. See copy which is document one in Addendum. It is clear from the telephone message that the Court knew Turley needed a continuance of two to five months. The Court also knew that Turley was out of the country and about when he would return, that Turley wanted to present his case, and that he was unrepresented. It reads:

> February 13 - Michael Turley called from the Peoples Republic of China - he requested a continuance of the trial. He is not scheduled back in the United Stated until probably April-July or August. He and his attorney have had a miscommunication so he is representing himself.
>
> Someone picks up his mail and sends it to him and it takes a while to get to him.

Turley obviously got the notice of trial, but it came late due to circumstances beyond his control. The notice was mailed January 18 and was received on February 13, two days before trial. Record at 66, 156.

Prior to the phone call, the Court knew that Mr. Turley was out of the country and that there was a problem with the mail. Documents filed with the court before this phone call show that the Court and the Parties knew Turley was working in China and that some of his correspondence had been returned. Record at 28, 88-91.

There is no evidence in the record that the Court attempted to give Mr. Turley any information regarding his rights. On the contrary, instead of trying to give him information regarding his rights or granting a continuance, the Court struck Turley's pleadings and entered default two days later on the day of trial. Record at 176.

After the judgment was entered the Dewolfs sent notice of the judgment again to Turley's last known address. Again, Turley did not receive it. Record at 156.

Based on Nelson and Mullane Turley was denied due process because of improper notice. Also, as a layman, Turley was not "...accorded every consideration that may be reasonably indulged..." The court gave him no notice to appoint counsel, and no information regarding his rights. Further, two to five months is not an unreasonably long continuance. Some Courts

cannot reschedule any faster than that using the first available date. In addition, there was not reasonable time to prepare and make an appearance. Even if Turley were in the United States he could probably not prepare adequately for trial in two days. Not only was there not time to prepare, but there was not even time to travel from where he was in China to timely appear at trial unprepared.

Finally the notice was not reasonably calculated to give adequate notice under Graham. The Court and Dewolfs knew that there was a problem with the mail. Simply mailing to Turley's last known address the notice to appoint counsel, of trial , and entry of judgment while knowing he is out of state and while knowing that the mail will probably not reach him or will reach him late is a only a gesture and does not satisfy due process. This is especially true when there is a reasonable alternative like a continuance.

C. Denial of a hearing.

The Court should afford the parties an opportunity to make their appearance and present their objections. Mullane at 314.

Dewolfs filed a very detailed complaint, and Turley in his answer denied the allegations specifically. Record at 1-12, 13-19. The Court struck Turley's answer on the date of the trial as stated above.

Turley is convinced that he has meritorious defenses. In fact he thinks that Dewolf's claim that the well water was

contaminated is legally insufficient and is subject to summary judgment because Dewolfs ordered and paid for an independent study of the water before the sale which showed the water was satisfactory. Record at 128. Turley cannot find in the record where Dewolf's disclosed their study to the court at the time of trial. If this information was not disclosed it constitutes a failure to disclose material information to the Court. In addition, under these circumstances the Dewolfs cannot legally claim reliance on any alleged representation about the quality of the water by Turley. In addition, Turley has other evidence relating to Dewolf's claims of delay and lack of cooperation which he thinks the Court was unaware of at the time of trial.

Based on Mullane and the fact that the Court denied Turley opportunity to present his defenses, this Court should rule that Turley's constitutional right to a hearing was violated.

II. There was an abuse of discretion.

A. Standard of Review

The question presented to the Court of Appeals is whether the trial erred by failing to set aside a judgment. The question of whether the trial court strictly complied with procedural requirements is a question of law that is reviewed for correctness. See generally State v. Pena, 896 P.2d. 932, 936, 938 (Utah 1994). The Court of Appeals reviews the trial court decision regarding the motion for relief from a judgement for

abuse of discretion, but this discretionary power must not be used arbitrarily, but must have been used reasonably and according to the law. Naisbitt v. Herrick 290 P 950, 953 (Utah 1930). The law narrows the trial court's discretion regarding a motion to set aside a default judgement, in order to accomplish justice by requiring the trial court to accept any reasonable cause for the default, and to resolve doubt in favor of hearing the merits of that case.

The Supreme Court of Utah explains:

> [A] court should be generally indulgent toward permitting full inquiry and knowledge of disputes so they can be settled advisedly and in conformity with law and justice. To clamp a judgement rigidly and irrevocably on a party without hearing is obviously a harsh and oppressive thing. It is fundamental in our system of justice that each party should be afforded an opportunity to present his side of the case. For that reason it is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgement where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside.

Mayhew v. Standard Gilsonite Company, 376 P.2d 951, 952 (Utah 1962). The Supreme Court further clarifies the test for abuse of discretion, saying:

> It is indeed commendable to handle cases with dispatch . . . But it is even more important to keep in mind that the very reason for existence of courts is to afford disputants an opportunity to be heard and to do justice between them. In conformity with that principle the courts generally tend to favor granting relief from default judgements where there is any reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party.

Westinghouse El. Sup. Co. v. Paul W. Larsen Con., Inc., 544 P.2d

876, 879 (Utah 1975)(the Utah Supreme Court reversed the lower court for failing to give proper weight to the higher priority ). Where there is doubt about whether a default judgement should be set aside, the doubt should be resolved in favor of hearing the case, so that the resolution may be just. Interstate Excavating v. Agla Development, 611 P.2d 369, 371 (Utah 1980); *cf.* Locke v. Peterson, 3 Utah 2d 415, 285 P.2d 1111, 1113 (1955). *See also generally* State by & through D. of S.S. v. Musselman, 667 P.2d 1053, 1055 (Utah 1983)(agreeing that the courts should be liberal in granting relief from default so that controversies may be tried on the merits); Carman v. Slavens, 546 P.2d 601, 603 (Utah 1976) (the discretion is not unrestrained, action must be within reason and good conscience to protect both parties and serve justice, doubt is resolved to favor giving both parties a day in court for trial on the merits); Airkem Intermountain, Inc. v. Parker, 513 P.2d 429, 431 (Utah 1973) (the court desires to protect the party that has not had the opportunity to present claim or defense, relief granted where movant shows diligence and that circumstances prevented his appearance); Heathman v. Fabian & Clendenin, 377 P.2d 189, 190 (Utah 1962)(the court should disfavor default judgements in the interest of justice and fair play).

Finally, review of the trial court's decision regarding whether setting aside the judgement would prejudice the non-

moving party, the Court of Appeals should consider the question of fact under the clearly erroneous standard. State v. Blair, 862 P.2d. 802, 805, (Utah 1993).

B. Rule 60 (b) was appropriately but incorrectly applied when the trial court denied the Motion for Relief from Judgement

Utah Rule of Civil Procedure 60 (b) governs motions to set aside judgments, such as Mr. Turley's Motion for Relief from Judgment. The rule organizes the comprehensive set of reasons to justify relief into seven subsections. The rule explicitly states that in order to move under subsections (1) - (4) the motion must be submitted within three months of the entry of judgment. Under subsection (7), the court may relieve a party from a default judgement for "any other reason justifying relief from the operation of the judgement," so long as the motion is made within a reasonable time. Motions that are properly considered under subsections (1) through (6) are not considered under subsection (7). Laub v. South Cent. Utah Tel. Ass'n, 657 P.2d 1304, 1306 - 1307 (Utah 1982); Richins v. Delbert Chipman and Sons, 817 P.2d 382 (Utah Ct. App. 1991); *cf* Memorandum Decision ¶ 16.

The Appellant, Michael Turley, agrees with the trial court decision to consider his Motion for Relief from Judgement under Utah Rule of Civil Procedure 60 (b) (7), which allows the court

to set aside a default judgement in the interests of justice. Memorandum Decision ¶¶ 14, 16 - 17, 19 - 25, Record at 178-180. It was within the discretion of the trial court to determine whether or not the motion properly fit under subsection (1) covering mistake, inadvertence, surprise, or excusable neglect (Larsen v. Collins, 684 P.2d 52 (Utah 1984).), or within the other subsections of Rule 60 (b). Appellant does not challenge the trial courts decision to consider his motion as it was made, under subsection (7), rather than under the time-barred subsections. Because circumstances beyond Mr. Turley's control prevented him from presenting his case at trial in spite of his diligent efforts to protect his interests, subsection (7) should be applied, in harmony with the trial courts proper, reasonable, legal discretion as set out above.

However, the trial court applied the wrong procedure by substituting the three month time limit which Rule 60 (b) imposes on motions made under subsections (1) through (4) to Mr. Turley's subsection (7) motion. *Cf* Memorandum Decision ¶¶ 18 & 22, Record at 180. Instead of substituting the time limit applicable to subsections (1) through (4), the trial court was required to apply reasonable discretion to the facts of the case, "considering such factors as the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties."

Memorandum Decision ¶ 14, *citing* Maertz v. Maertz, 827 P.2d 259, 261 (Utah App. 1992); Record 178. The trial court was also required to give substantial weight to the importance of hearing the merits and giving both parties the opportunity to prove their case, as detailed above. *See supra*, Standard of Review. Delay in sending the notice of judgment is a factor in determining timeliness of later challenges. Workman v. Nagle const., Co. 802 P.2d 749, 751 (Utah App. 1990). Moving for relief within a month after learning of the judgment has been considered reasonable. Workman at 752. The Court of Appeals should reverse the trial court so the correct procedural law can be applied.

C. The Court failed to consider willfulness, bad faith, and fault in the decision to impose sanctions and in considering the motion to set aside judgment.

The trial court should have required a showing of willfulness, fault, or bad faith before imposing sanctions on Turley's failure to appear at trial. "The sanctions imposed [default judgement] require a showing of [defendant's] willfulness, bad faith, or fault." Utah Dept. of Transp. v. Osguthorpe, 892 P.2d 4, 6 (Utah 1995); *citing* First Fed. Savings and Loan Ass'n v. Schamaneck , 684 P.2d at 1266 (*quoting* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 96 S.Ct. 2778, 2779, 49 L.Ed.2d 747, 749 (1976)). The Utah Supreme Court emphasized that "Imposing sanctions for a party's refusal

to respond to a court order compelling discovery is a harsh sanction and therefor, requires a showing of willfulness, bad faith, or fault on the part of the non-complying party," although failure to make a *finding* of bad faith is not fatal if the record allows the appeals court to gain a full understanding of the circumstances. Amica Mutual Insurance Co. v. Schettler, 768 P.2d 950, 961 (Utah Ct. App. 1989).

In Amica, the Supreme Court inferred a finding of bad faith from a record showing "aggravated misconduct" in the form of willful disobedience to discovery orders, fabricated testimony, and witness tampering. Amica, 961 - 962. Likewise, in Utah Dept. of Transp. v. Osguthorpe, the Utah Supreme Court found adequate facts and circumstances support the refusal of a Rule 60 (b) motion when the record revealed that defendant Osguthorpe had "multiple and repeated opportunities to assert his claims and positions and has flagrantly neglected to do so." 892 P.2d 4, 8-9 (Utah 1995). Defendant Osguthorpe went through two attorneys, both of whom withdrew from representing him. He ignored discovery requests for more than a year. He was living in the state and receiving all notices and communications about the case during the entire time of his willful disobedience. Osguthorpe attempted to deal directly with Governor Bangerter rather than with the court. He lied in his affidavits. (*Id.* 4-7).

In this case, Turley hired a lawyer. He fired that lawyer

when he thought that lawyer was doing a poor job. Record at 141. Even while unrepresented, and out of state and under almost impossible circumstances, he attempted to responded to the requirements of the Court, but as a layman he did not understand the procedural requirements involved in preparing his trial defense.

In addition, Turley could not find competent counsel from China, or work with counsel to develop his defense without adequate communication.

Turley did ask the Court for a continuance and gave the court some suggestions on when he could attend trial.

As stated in Mr. Turley's affidavits dated August 21 and October 18, 1996, in support of his motion to set aside, Mr. Turley explained that he was in China on assignment from his employer to start up a power plant, to teach the Chinese how to run the plant, and to turn the plant over to them once they learned. This required him to work twelve-hour days. Record at 123-124. In addition, it was difficult for him to receive mail. His mail went to Windsor, Connecticut, then to Hong Kong, then it was hand carried to the Guang Dong Province of China. The mail had to pass through Chinese customs and where it was sometimes held at the border for inspection. As a consequence, Mr. Turley often received his mail late, and sometimes not at all. Record at 155, 123-123.

Based on the authority cited above, the trial court's error

in deciding to deny the Motion for Relief from judgment was especially grievous considering that the court did not apply appropriate standards while making the decision to grant the default in the first place.

The record in the instant case demonstrates that the trial court expressly refused to weigh the appropriate circumstantial factors. When it decided to grant the default, the trial court knew that Mr. Turley wanted to comply with procedural requirements but was prevented from it by poor communications between The People's Republic of China and Utah. Memorandum Decision ¶¶ 7, Record at 176.

Nevertheless, the trial court entered default against Mr. Turley because he "fail[ed] to comply and cooperate with discovery, . . . as well as his failure to appear at either scheduled pretrial conferences or the non-jury trial," without any finding of willfulness, bad faith, or fault or a full consideration of the circumstances. Memorandum Decision ¶ 8, Record at 176.

The trial court again failed to consider the lack of willfulness, bad faith, fault, or Mr. Turley's circumstances or his diligent efforts to preserve his rights when the trial court denied the motion to set aside the default judgment, in spite of memoranda and affidavits reminding the court of the circumstances. The record demonstrates that the trial court

expressly refused to give any weight to these factors. The Memorandum Decision notes Mr. Turley's affidavits as "allegations" (¶ 19), but refutes them without authority by declaring that

> pro se individuals *have the same responsibilities in representing themselves as if they had retained counsel*, and that it was the Defendant's responsibility to remain appraised of the court proceedings, as well as to ensure that an avenue of reliable communication existed to maintain contact between the parties."

Memorandum Decision ¶ 20 (emphasis added), Record at 179. The trial court also declared that "Defendant's alleged inaccessibility should not be capable of eviscerating those limitations and procedures [referring to the time limits and rules of Utah Rules of Civil Procedure]." Memorandum Decision ¶ 21, Record at 179. The trial court deliberately refused to consider Mr. Turley's lack of experience in legal matters, lack of legal training or education, efforts to preserve his right to present a defense, efforts to obtain competent representation, the difficulties in maintaining communication between the parties from half way around the world, or Turley's inability to control these circumstances within the context of the case.

Dewolfs argued to the Court that Turley returned his mail, but there is no evidence of bad faith with respect to returning mail. It is true that some mail was returned, and it is also true that Turley told his brother in Nevada to return all of his mail for a few weeks, after which his brother resumed forwarding

the mail. Record at 156. The Court seemed to find the returned mail significant in refusing to set aside the judgment. Record at 187. However, returning the mail was not a factor with respect to the trial notice because the notice was received and Turley responded to it. Even if important mail is returned, it is not automatically bad faith. There are other possible explanations, and the issue is as most a question of fact.

In addition, the Court seemed to think it was significant that Turley had not responded to discovery. Record at 100. Some interrogatories and requests for production were mailed to Turley while he had counsel, but the requests for admissions were mailed on December 26, 1995, after Turley's counsel had withdrawn on August 28, 1995. Record at 54, 63. Not only is it unreasonable to expect a layman to understand the purpose of request for admissions, but there is no indication in the record that Turley received them. These admissions were later deemed admitted and formed a basis for the motion for summary judgment. Further, it appears from the record that the admissions were sent by Dewolfs with knowledge that Turley was out of the country and probably would not receive them. Record at 88, 108. Did Dewolfs send the requests for admissions with the intent that Turley would not receive them? These were detailed admissions on every issue of the case. Did Dewolfs plan to take advantage of Turley by sending the requests to an address they knew would not work without making any effort to make a good faith attempt to serve

Turley?

Lastly, although the issued was argued, the trial court failed to consider whether there was prejudice to the other parties. Turley argued that a twenty-six day delay did not create prejudice for Dewolfs. Judgment was entered April 18, and notice of the judgment was sent May 3. This delay in sending the notice should be weighed with other factors as stated in Workman. Turley returned to the United States on July 2, and received notice of the judgment in late July or early August. Record at 156. Turley's motion to set aside was filed August 28. Record at 135, 156. Thus Turley filed his motion to set aside with thirty days after learning of the judgment. The Dewolfs also argued the issue of prejudice by arguing that a trial in this case would reopen emotional wounds and thereby cause prejudice. Record at 137. It does not seem appropriate for plaintiffs to claim prejudice because of stress when their claims go to trial, but in any event, the Court did not address any of these issues of prejudice in its decision. Record at 186.

**CONCLUSION**

Michael Turley requests that the Appellate Court reverse the Trial Court by overturning the default judgment, reinstating his answer, allowing him an opportunity to respond to Dewolfs requests for admissions, and directing the Trial Court hear the case at a trial on the merits.

Dated this 16 day of May, 1997.

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IN THE UTAH COURT OF APPEALS

| | | |
|---|---|---|
| EDWARD L. and BRENDA J. DEWOLF, Plaintiffs and Appellees | : | CERTIFICATE OF MAILING AND DELIVERY |
| vs. | : | No. 970174, 970039, |
| MICHAEL V. TURLEY, Defendant and Appellee. | : | 940401013 Appeal for Fourth District Court, Millard County, Judge Donald Eyre, Jr. |

I hereby certify that I delivered two true and correct copies of the Brief of the Appellant to Mr. Richard Coxson, 457 North Main, Spanish Fork, UT 84660 this 16th day of May, 1997.

Barbara Beese
Secretary

## ADDENDUM

Document one - Telephone Message

Document two - Memorandum Decision

4TH DISTRICT COURT - FILLMORE

06/01/94 TIME: 16:41 CLERK: NBE
CASE: 940401013CV REF:
PLTFF/PET: DEWOLF, EDWARD L
DFNDT/RES: TURLEY, MICHAEL V

PAYOR: RICHARD C COXSON
Amt. Received: 100.00
Civil Fees NO: 1151 Check : 100.00

CASE FILED 05-26-94

Receipt No: 940020025

SAVE THIS RECEIPT **** SAVE THIS RECEIPT

4TH DIS

06/01/94 TI
CASE: 940401013CV
PLTFF/PET: DEWOLF, EI
DFNDT/RES: TURLEY, M
PAYOR: RICHARD C COX
Amt.
Civil Fees NO: 1151
CASE FILED 05-26-94
Receipt No:
SAVE THIS RECEIPT **

Judge Reyes - Feb 13

Michael Turley called from the Peoples Republic of China - he requested a continuance of the trial. He is not scheduled back in the U.S. until probably April - July or August. He & his attorney have had a mis communication so he is representing himself. Someone picks up his mail & sends it to him & it takes a while to get to him.

# IN THE FOURTH JUDICIAL DISTRICT COURT
# MILLARD COUNTY, STATE OF UTAH

| | |
|---|---|
| EDWARD L. AND BRENDA J. DEWOLF<br>Plaintiffs<br><br>vs.<br><br>MICHAEL V. TURLEY,<br>Defendant. | **ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT**<br><br>CASE NO. 940401013<br><br>DATE: December 9, 1996<br><br>JUDGE DONALD J. EYRE |

This matter came before the Court on the Defendant's Motion To Set Aside Default Judgment on October 24, 1996. Both parties have had the opportunity to submit written memorandum, and argue their position to the Court, both being represented by counsel. The Court, having received and reviewed the motion, including memorandum in support and memorandum in opposition, having heard the argument of counsel, and having reviewed the applicable law, now makes the following findings of fact and conclusions of law:

## FINDINGS OF FACT

1. The Court finds that the Plaintiffs filed their Complaint on May 26, 1994. At the time the Complaint was filed, the Defendant's address was listed as 300 East 173 South in Delta, Utah.

2. Defendant's attorney, D. Kevin DeGraw, filed his Notice of Withdrawal of Counsel on August 29, 1995. Accordingly, the Plaintiff's attorney, Richard C. Coxson, filed a Notice to Appear or Appoint on September 5, 1995. At the time the Defendant's attorney withdrew, the Defendant's address was listed as P.O. Box 163 in Logandale, Nevada.

3. On October 2, 1995, the Plaintiffs' Request for Pretrial was filed. In accordance with that request, a notice stating that the Pretrial Conference would be held on December

21, 1995 was sent to the Plaintiffs and Defendant. The Defendant was given the option to handle the matter telephonically if it would be more convenient. This Pretrial Conference was not held on December 21, 1995, but was reset as a Telephonic Pretrial Conference, to be heard on January 18, 1996. Notice was sent to the Defendant's Logandale, Nevada address. The Plaintiff's attorney initiated the telephone conference call, but the Defendant's phone number was unavailable. At that time, the trial date was set for February 15, 1996.

4. On January 18, 1996, notice of the non-jury trial setting was filed with this Court. Notice that trial was set for February 15, 1996 was sent to the Defendant's Logandale, Nevada address.

5. This Court finds that the Plaintiffs attempted to contact the Defendant at the Logandale, Nevada address via mail on at least four occasions, and that those letters were refused.

6. The Plaintiff filed a Motion for Summary Judgment and a Motion to Deem Admissions Admitted on February 5, 1996. This Court, finding that the admissions were sent to, and subsequently refused by, the Defendant, and the time within which the Defendant could respond having elapsed, entered its Order Deeming Admissions Admitted on February 15, 1996.

7. This Court finds that the Plaintiffs were present with counsel before this Court on February 15, 1996, but that Defendant was not present, having telephoned to request a continuance. At that time, this Court ordered the Defendant's Answer stricken, and a Default Order was entered.

8. On April 18, 1996, this Court's Order of Judgment was filed. In its Order, the Court noted the following: the Defendant refused the Plaintiffs' discovery requests; the Defendant failed to appear, either in person or telephonically, at both scheduled pretrial conferences; the Plaintiffs' Requests for Admissions dealt with remaining issues of facts in the matter, and Defendant did not timely respond to those requests; and Defendant failed to respond to Plaintiffs' Motion for Summary Judgment. Therefore, based on the Defendant's

failure to comply and cooperate with discovery, as well as his failure to appear at either scheduled pretrial conferences or the non-jury trial, this Court entered a default judgment.

9. On May 3, 1996, the Plaintiffs mailed a Notice of Entry of Judgment to the Defendant at his Logandale, Nevada address.

10. This Court granted an Ex Parte Order of Attachment to the Plaintiffs, filed on July 30, 1996, which attached the Defendant's Piper PA-22, SN 22-5388, as listed by the FAA. The Defendant was sent notice of Plaintiff's Ex Parte Motion and Affidavit in Support of and Order of Attachment at the Logandale, Nevada address.

11. The Defendant filed a Motion to Set Aside Default Judgment on August 22, 1996 pursuant to Rules 55 and 60(b) of the Utah Rules of Civil Procedure.

12. This Court finds that the Defendant discharged his attorney while out of the country, believing that he was not being represented well. Aff. of Michael V. Turley, ¶ 2, filed September 9, 1996. The Defendant, upon his return to the United States, sought out and appointed his present counsel. Aff. of Michael V. Turley, ¶ 2, filed October 21, 1996. This Court also notes that the Defendant alleges it was difficult for him to receive mail while out of the country, and that failure to receive court notices, as well as work obligations, resulted in his failure to appear at trial and the default judgment. Aff. of Michael V. Turley, ¶¶ 12-16, filed August 22, 1996.

## CONCLUSIONS OF LAW

1. Utah Rule of Civil Procedure (URCP) 55(c) grants courts the discretion to set aside an entry of default for good cause shown, "and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." *See also*, Amica Mutual Insurance Co. v. Schettler, 768 P.2d 950 (Utah Ct. App. 1989); Calder Bros. Co. v. Anderson, 652 P.2d 922 (Utah 1982).

2. URCP 60(b) grants courts, upon motion, the discretion to set aside a final judgment, order, or proceeding under certain circumstances, including "any other reason

justifying relief from the operation of the judgment."[1] However, this Court also finds that this discretionary power "'should be very cautiously and sparingly invoked by the Court only in unusual and exceptional instances.'" Laub v. South Central Utah Telephone Ass'n, 657 P.2d 1304, 1307-08 (Utah 1982), *quoting* Hughes v. Sanders, 287 F. Supp. 332, 334 (E.D.Okl. 1968).

3. In addition, this Court finds that a Rule 60(b) motion relying on grounds (5) through (7) does not have to be made within three months, but it must be made within a reasonable time:

> The decision not to limit the right to raise these challenges within a set time period reflects the seriousness of the issues. . . . In general, under all of these provisions the moving party need show only that she acted diligently once the basis for relief became available, and that the delay in seeking relief did not cause undue hardship to the opposing party.

Workman v. Nagle Construction, Inc., 802 P.2d 749, 752 (Utah App. 1990), *quoting* J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* § 12.6 at 574 (1985). In determining what constitutes a reasonable time, this Court finds that the determination depends upon the facts of each case, "considering such factors as the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." Maertz v. Maertz, 827 P.2d 259, 261 (Utah App. 1992).

4. This Court finds that subdivision (5) permits setting aside a default judgment in cases of a void judgment. A judgment will be deemed void only in cases where the court

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[1] Other circumstances warranting relief from a final judgment, order, or proceeding include the following: mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence not discoverable for purposes of Rule 59(b); fraud, misrepresentation, or other misconduct by an adverse party; defendant was not personally served with a summons, and failed to appear; judgment is void; judgment was satisfied, released, or discharged, or a prior judgment on which the present judgment was based was reversed or vacated, or it would be inequitable if the prior judgment had prospective application. URCP R. 60(b)(1)-(6) (1996).

rendering the judgment lacked subject matter jurisdiction over the parties or the subject matter. Richins v. Delbert Chipman & Sons, 817 P.2d 382, 385 (Utah Ct. App. 1991).

5. This Court finds that subdivision (7), the residuary clause of rule 60(b), has three requirements: (1) the basis for setting aside judgment cannot be the same as those found in subdivisions (1) through (6); (2) the reason must justify relief; and (3) the motion must be made within a reasonable time. Laub at 1306-07.

6. Furthermore, this Court finds that, when making a determination on a motion to set aside a default judgment, the claim's merits are generally not re-examined, because the courts are mainly concerned "only with why a party failed to answer, not with the merits of any defense he might offer." International Resources v. Dunfield, 599 P.2d 513, 515 (Utah 1979).

7. This Court finds that, due to the three month time limitation established in Rule 60(b)(1)-(4) of the Utah Rules of Civil Procedure to make a motion for setting aside a default judgment, Defendant cannot successfully raise those in its Motion to Set Aside Default Judgment. Plaintiff mailed the Notice of Entry of Judgment to the Defendant on May 3, 1996, and the Defendant's Motion to Set Aside Default Judgment was filed on August 22, 1996. Clearly, more than three months had elapsed before Defendant's motion was filed.

8. This Court finds that, if counsel for a party has withdrawn, that party will either appoint new counsel, or may proceed pro se. In the event new counsel is not appointed, pro se individuals have the same responsibilities in representing themselves as if they had retained counsel. Therefore, this Court finds that the Defendant was responsible for maintaining his own defense from the time his first attorney withdrew to the time he appointed new counsel. As such, it was the Defendant's responsibility to remain apprised of the court proceedings, as well as to ensure that an avenue of reliable communication existed to maintain contact between the parties.

9. With respect to Defendant's reliance on Rule 60(b)(7), this Court finds that reliance ill-founded. It is not incumbent upon this Court to re-examine the merits of

Defendant's assertions; this Court need only examine the basis for Defendant's failure to appear. In examining the record, this Court finds that the time limits and procedures prescribed by the Utah Rules of Civil Procedure were adhered to, and the Defendant's alleged inaccessibility should not be capable of eviscerating those limitations and procedures.

10. In addition, this Court finds that Defendant has not satisfied the requirements for maintaining a Rule 60(b)(7) motion. In filing his Motion to Set Aside Default Judgment over three months from the date the Notice of Judgment was entered, this Court finds that the Defendant has not presented its motion within a reasonable time.

11. This Court finds that, because the actions and property involved in the dispute were located in Millard County, and as the parties at the time the Complaint was filed were residents of Millard County, it properly exercised jurisdiction over the matter; therefore, this Court finds Rule 60(b)(5) inapplicable to the present case.

12. In oral argument, the Defendant cited Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983) as dispositive on the issue of whether he was given timely and adequate notice of the trial. This Court finds that Nelson v. Jacobsen stood for the principle that "where notice is ambiguous or inadequate to inform a party of the nature of the proceedings against him or not given sufficiently in advance of the proceeding to permit preparation, a party is deprived of due process." Id. at 1212. In Nelson, the court informed the defendant that his case was scheduled for a hearing approximately two weeks later, meaning that the matter was scheduled for a non-jury trial. The defendant misunderstood the court's ruling, and received an order scheduling the case for trial and notice of the trial date two days before the trial. This Court finds the facts of Nelson distinguishable from the facts in the case at issue. Here, the Defendant was sent notice of the trial on January 18, 1996, over twenty-five days prior to the trial date of February 15, 1996. Defendant argues that, due to his inaccessibility, he did not receive notice sufficiently in advance of the trial date to prepare, but Defendant obfuscates the procedural requirement. In terms of procedural due process, notice must be

reasonably calculated to inform parties of the pendency of the action. Notice sent over twenty-five days prior to the trial date is sufficient to satisfy this requirement.

13. It is therefore ORDERED, ADJUDGED and DECREED that the Defendant's Motion for Relief from Judgement is DENIED.

Dated at Provo, Utah this 9th day of December, 1996.

BY THE COURT:

JUDGE DONALD J. EYRE

ORIGINAL IF IN RED INK
STATE OF UTAH
FOURTH DIST. COURT · UTAH COUNTY

## MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 10th day of December, 1996:

Denton M. Hatch
195 N Main
PO Box 306
Spanish Fork, UT 84660

Richard C. Coxson
457 N Main St
Spanish Fork, UT 84660

CARMA B. SMITH
CLERK OF THE COURT

By _____
Deputy Clerk